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No. 06-863

In the Supreme Court of the United States

SHANE FAUSEY,

Petitioner,

v.

CHERYL HILLER,

Respondent.

On Petition for a Writ of Certiorari to the Supreme Court of Pennsylvania

RESPONDENT'S BRIEF IN OPPOSITION

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COUNTER-QUESTION PRESENTED

Whether parental rights were sufficiently protected when the Supreme Court of Pennsylvania approved limited visitation to a grandmother who overcame the judicially-imposed strong presumption in favor of the visitation decision of a fit parent and also met the requirements of the state grandparent visitation statute by demonstrating that (1) she had almost daily contact with her young grandson until her daughter's death, when the child's father abruptly terminated that contact, and that (2) the limited visitation that was granted would not interfere with the parent-child relationship and would be in the best interest of the child.

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RESPONDENT'S BRIEF IN OPPOSITION

COUNTER-STATEMENT OF THE CASE

Petitioner requests this Court to review a decision of the Supreme Court of Pennsylvania upholding the constitutionality of a grandparent visitation order under Section 5311 of that state's Domestic Relations Code. As applied by the court, this statute permits "reasonable" visitation by a parent of a deceased parent upon a judicial "finding" supported by convincing reasons that the visitation "would not interfere with the [surviving] parent-child relationship" and "would be in the best interest of the child," taking into consideration the previous "amount of personal contact" between the grandparent and the child. 23 Pa. Cons. Stat. Ann. § 5311.

Petitioner's framing of the question presented as whether a clear and convincing showing of "harm" to the child is necessary to order grandparent visitation over a parent's objection mischaracterizes both this case and this Court's holding in *Troxel v. Granville*, 530 U.S. 57 (2000). The Pennsylvania statute mirrors two other state statutes cited with approval in *Troxel*, and the Pennsylvania Supreme Court applied a strong presumption in favor of a fit parent's child rearing decisions and held the grandparent to a higher standard of proof than *Troxel* required. Petitioner was essentially afforded the protection he seeks, and there is no reason for further review of this case.

1. The Relationship Between Kaelen Fausey and His Grandmother, Cheryl Hiller

When Kaelen Fausey was less than four years old, his mother, Stephanie Fausey, was diagnosed with a life-threatening form of cancer. R. 15, R. 174-75.[1] As she endured the intensive and protracted medical treatment required, she and her husband relied heavily upon the aid of her mother, Cheryl Hiller. 67a.

Kaelen grew exceptionally close to his grandmother as a result of her devotion to him during his mother's illness. 67a, 70a. He often visited Hiller's home, where he was able to develop relationships with many of his cousins, as well as his great-grandfather and other family members. 70a. Hiller also frequently spent time with Kaelen one-on-one, taking him on picnics, swimming trips, and stock car events. 70a.

When Stephanie Fausey's condition worsened, Hiller's contact with Kaelen intensified, as she and other family members made themselves available to help in whatever ways they could. 67a. Beginning in 2000, Hiller babysat for Kaelen regularly, and, along with Kaelen's great-grandfather, provided him with transportation to and from school. *Id.* When it became clear that his mother's situation was hopeless, it was Hiller who helped to prepare her grandson for the eventuality of his loss. 2a, 71a.

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[1] Citations preceded by "R" refer to the record below; citations followed by "a" refer to the appendix to the petition.

Stephanie Fausey died on May 25, 2002. Kaelen was seven years old. 65a.

Not long after his mother's death, Kaelen's almost-daily contact with his grandmother was abruptly terminated by his father, Shane Fausey. 2a, 67a. Between May 2002 and April 2003, Hiller was able to see Kaelen on only three occasions, one of which occurred accidentally and none of which occurred at her home. 67a. Hiller repeatedly pleaded with Fausey to permit her to continue having a relationship with her grandson. 67a-68a. However, her phone messages went unreturned, and if Fausey answered the phone, he represented that Kaelen could not visit Hiller because of other plans. 68a.

2. The Pennsylvania Court Proceedings

As a result of Fausey's continual refusals to allow Hiller to spend time with Kaelen, Hiller filed an application for visitation with the Court of Common Pleas of Lycoming County, Pennsylvania. 2a. Fausey opposed Hiller's application, at times contending that it would be in Kaelen's best interest to be completely barred from contact with his grandmother and at other times vacillating on the amount of visitation he believed should be permitted. 4a, 68a.

The court held a two-day trial and heard testimony from 14 fact witnesses and one expert witness. 66a. After considering this extensive evidentiary record, the court entered a final order in which it awarded Hiller one overnight visit with Kaelen per month from 9:00

a.m. on Saturday to 7:00 p.m. on Sunday, plus one week of vacation during the summer, with Hiller required to provide all transportation. 85a-86a. The court denied Hiller's request for visitation for any length of time on Christmas Eve or Christmas Day. R. 234.

As the Pennsylvania Supreme Court noted, the trial court's application of Section 5311 was thoroughly supported by the record and the law. 3a. First, the trial court applied a "presumption that a fit parent acts in the child's best interests" and placed the burden of proof squarely on the grandparent. 3a, 66a. The court then considered the contact between Hiller and Kaelen prior to Hiller's application. 3a, 67a, 70a. It also considered whether visitation would interfere with Fausey's relationship with Kaelen. 6a, 71a-73a. The court made numerous specific factual findings to support its ultimate decision, including the following:

- Kaelen had extensive and longstanding contact with Hiller before his mother's death, which was permitted by both parents. 67a, 70a.
- Kaelen clearly enjoyed the time he spent at Hiller's home, to the point that he often did not want to leave. 70a.
- Kaelen would benefit from the continued opportunity to spend time with his maternal great-grandfather, who has always been an important person in his life. 71a.
- Historically, Kaelen had sought out Hiller to express his emotions and receive comfort

regarding his mother's death—emotional support that Fausey himself acknowledged Kaelen needed as he was unable to express his feelings in other circumstances. 71a.

- There was no evidence showing any possibility that Hiller might interfere in any way with Kaelen's loving relationship with his father. 71a-73a.

The trial court found that Hiller rebutted the presumptive validity of Fausey's decision regarding visitation and demonstrated that visitation with her would be in Kaelen's best interest and would not disturb his relationship with his father. 73a. On appeal, both the Pennsylvania Superior Court and Supreme Court upheld this decision. 25a-26a, 64a.

The Pennsylvania Supreme Court's decision included a comparison of the statute and factual findings in this case to those in *Troxel*. The court noted that this Court's rationale in *Troxel* was three-pronged: (1) the Washington statute was "breathtakingly broad," allowing ***any person at any time*** to petition for child custody, 530 U.S. at 67; (2) the Washington trial court, rather than granting presumptive validity to the fit parent's decision, instead applied a ***presumption in favor of the grandparent***, *id.* at 59; and (3) the Washington trial court failed to base its decision on anything more than ***"slender findings,"*** *id.* at 71. *See* 10a.

In contrast, the Pennsylvania Supreme Court rested its decision on the following: (1) Section 5311 of the Domestic Relations Code contains ***explicit limitations*** on who may petition for visitation; (2) in accordance with precedent, the Pennsylvania trial court applied the ***presumption that the parent's decision regarding grandparent visitation was in the child's best interest*** and required Hiller to overcome that presumption; and (3) the Pennsylvania trial court issued ***extensive factual findings*** in support of its conclusion that Hiller should be granted limited visitation rights and that such visitation would not harm Kaelen or his relationship with Fausey in any way. 25a-26a.

Applying strict scrutiny and a "convincing reasons" standard because of the constitutional rights involved, the Pennsylvania Supreme Court concluded that the trial court had satisfied both the statute and the constraints of *Troxel*. 17a, 21a, 25a. The court further held that in combination the "stringent requirements [of the statute] and the presumption that parents act in a child's best interest, sufficiently protect the fundamental right of parents without requiring any additional demonstration of unfitness or specific requirement of harm or potential harm." 25a.

REASONS FOR DENYING THE WRIT

This Court disapproved the decision of the Washington trial court in *Troxel* because of its failure to pay any heed to the constitutional right of parents to guide the upbringing of their children. At the same time, however, this Court wisely declined to immerse itself in detailed line-drawing as to what circumstances must be present before visitation may be awarded against a fit parent's wishes. Such family law issues, perhaps more than any others, traditionally have been left to the states to decide. This case offers no reason for the Court to deviate from that course.

Petitioner now asks this Court to engage in the exact exercise that it declined to perform in *Troxel*. Despite petitioner's contrary assertions, there is no significant conflict among the states suggesting any need for the Court to accept this invitation. The Pennsylvania court decisions in this case carefully applied each of the principles set forth by this Court in *Troxel*--affording the parent even more protection than was required there--and are generally consistent with those of other state courts. To the extent that other jurisdictions may occasionally go outside the norm, further review of this case would be unlikely to remedy the situation because the Pennsylvania statutory scheme as applied falls well within the *Troxel*-approved paradigm. Accordingly, the petition should be denied.

I. The States Are Not Deeply Divided in Their Post-*Troxel* Decisions Regarding Grandparent Visitation.

Petitioner's primary argument is that this Court left open a constitutional question in *Troxel* that it should now resolve because the states are "deeply divided" on the issue. Pet. at 2, 11. However, there is no such deep division requiring the Court's intervention.

As noted above, the Washington child custody statute at issue in *Troxel* was problematic because it allowed "any person" to petition a court "at any time" for visitation rights. The Washington Supreme Court held that the statute was unacceptable because (1) it was worded far too broadly, and (2) the United States Constitution prohibits a state from overriding a parent's wishes regarding child custody or visitation unless it is necessary "to prevent harm or potential harm to a child." 530 U.S. at 63.

This Court agreed with the first of these rationales, but expressly declined to rule on the second. *Id.* at 73. It chose not to reach that question because it recognized the need for factual sensitivity in custody and visitation issues. As the plurality opinion stated: "Because much state-court adjudication in this context occurs on a case-by-case basis, we would be hesitant to hold that specific nonparental visitation statutes violate the Due Process Clause as a *per se* matter." *Id.* Accordingly, the Court deliberately decided not to promulgate a bright-line or *per se* standard to be applied in all grandparent visitation cases.

Troxel produced no "deep division" among the states, and there is no need to revisit this area of the law or elaborate upon that decision. Petitioner attempts to manufacture the appearance of a division by grouping states into two categories allegedly based on whether they require grandparents seeking visitation to prove that such visitation "is necessary to avoid harm to the child." Pet. at 12. In the process, petitioner (1) ignores the protections given parents by Pennsylvania and other states that permit grandparent visitation without an explicit showing of harm to the child and (2) overstates the test employed in states that appear to require grandparents seeking visitation to show that denial of the request would result in harm to the child.

Petitioner contends that in the states he characterizes as falling on the "no harm" side of the "divide," parental rights are subject to no protection at all and judges "may override the parent's presumptively valid decision whenever the court disagrees with the parent's decision and concludes that additional contact with a grandparent would be in the child's 'best interests.'" Pet. at 4. This simply is not so.

All states on both sides of the alleged "divide," including petitioner's 11 so-called "no harm" states, give protection and weight to parents' rights through a kaleidoscope of different methods. In the case of the "no harm" states, these methods include the following:

- Some states permit awards of visitation only in the event of exceptional circumstances such as the death of one parent or the divorce or separation of the parents.

See, e.g., 23 Pa. Cons. Stat. Ann. §§ 5311, 5312; Minn. Stat. § 257C.08; Mo. Rev. Stat. § 452.402; Ohio Rev. Code Ann. § 3109.11.

- Some states require a preexisting relationship of some significance between the grandparent and the child, which may need to be coupled with a limiting circumstance such as the death of one parent or the divorce or separation of the parents, as a condition precedent to the award of visitation. *See, e.g.*, 23 Pa. Cons. Stat. Ann. § 5311; Kan. Stat. Ann. § 38-129(a); Minn. Stat. § 257C.08; Neb. Rev. Stat. § 43-1802(2).

- Some states require grandparents to demonstrate not only that allowing visitation would be in the child's best interest, but also that such visitation would have no adverse effect upon the child's relationship with the surviving parent. 23 Pa. Cons. Stat. Ann. § 5311; Minn. Stat. § 257C.08; Neb. Rev. Stat. § 43-1802(2); S.D. Codified Laws § 25-4-52; W. Va. Code Ann. § 48-10-501.

- Finally, some states require the grandparent to rebut the presumption required by this Court favoring the fit parent's decision on visitation by a heightened evidentiary showing, such as clear or convincing evidence. *See, e.g.*, 21a; *In re Adoption of C.A.*, 137 P.3d 318 (Colo. 2006); *Polasek v. Omura*, 136 P.3d 519 (Mont. 2006); *Hamit v. Hamit*, 715 N.W.2d 512 (Neb. 2006).

A majority of the so-called "no harm" states use some combination of these limitations to accord "special weight" to a fit parent's visitation decision as

this Court required in *Troxel*. 530 U.S. at 69. ***Parents are given all of these protections in Pennsylvania***. 25a.

Petitioner attempts to contrast the foregoing states with 12 others whose high courts supposedly require a showing of "harm" before grandparent visitation may be ordered, and claims "that any lesser standard . . . would afford inadequate 'special weight' to the fit parent's determination of what is best for the child." Pet. at 13.[2] However, the petition obscures significant similarities between the law of these states and that of the so-called "no harm" states.

As this Court acknowledged in *Troxel*, decisions in this area by their nature are intensely fact-specific. 530 U.S. at 73. On close analysis, the so-called "harm" states employ a much more nuanced and thoughtful approach than simply requiring the same harm in all cases to protect parental rights. The "harms" identified in the highest court decisions of these states bear many similarities to the limitations imposed in the so-called "no harm" states, demonstrating that petitioner's "harm-no harm" distinction is essentially semantic.[3]

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[2] Among the cases that petitioner cites as requiring "harm," two predate this Court's 2000 decision in *Troxel* and therefore do not constitute evidence of any post-*Troxel* "divide." *See Brooks v. Parkerson*, 454 S.E.2d 769 (Ga. 1995); *Williams v. Williams*, 501 S.E.2d 417 (Va. 1998).

[3] In fact, a number of the so-called "harm" states do not require harm per se before ordering grandparent visitation. Rather, they require a showing of "harm ***or potential harm***"—a crucial

For example, while the New Jersey Supreme Court in *Moriarty v. Bradt*, 827 A.2d 203, 223-24 (N.J. 2003), required a showing of "harm" under the specific circumstances of that case, it also explicitly stated that grandparents "may rely on the death of a parent or the breakup of the child's home through divorce or separation" to show harm and referred to other visitation statutes that "specifically recognize the potential for harm when a parent has died or a family breakup has occurred and visitation is denied."

Similarly, in *Blixt v. Blixt*, 774 N.E.2d 1052, 1060 (Mass. 2002), the Massachusetts Supreme Judicial Court made clear that the requirement it imposed on grandparents to show that the absence of visitation would cause the child significant harm presupposed a significant preexisting relationship between the grandparent and the child. The court further noted that disturbing a "child's preexisting relationship with a nonbiological parent" may be harmful in and of itself. *Id.* at 1061.

Further, in *In re C.A.M.A.*, 109 P.3d 405 (Wash. 2005), the Washington Supreme Court (the court whose reasoning this Court declined to adopt in *Troxel*) recognized that the arbitrary deprivation of a substantial relationship between a child and a third

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distinction ignored throughout the petition. Indeed, as this Court noted, even the Washington Supreme Court's holding in *Troxel*, which petitioner chides the Court for declining to follow, required only "harm or potential harm." 530 U.S. at 63.

person could cause severe psychological harm to the child. *Id.* at 410.

When these decisions of the so-called "harm" states are considered alongside the decisions and statutes of the so-called "no harm" states, petitioner's claim of a "deep divide" rings hollow. The law is much more complex and fact-specific than he acknowledges.

Moreover, a number of the so-called "harm" states permit grandparents to satisfy their burdens of proof by a preponderance of the evidence.[4] By contrast, many of the "no harm" states require clear or convincing evidence. *See supra* p. 10. It is far from clear

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[4] *See, e.g., Blixt*, 774 N.E.2d at 1060 (grandparents in Massachusetts must establish "by a preponderance of the credible evidence, that a decision by the judge to deny visitation is not in the best interests of the child"); *Moriarty*, 827 A.2d at 223 ("We instead approve a preponderance of the evidence burden in the [New Jersey] statute as fully protecting the fundamental rights of parents when coupled with the harm standard."); Ark. Code Ann. § 9-13-103(c)(2) ("petitioner must prove by a preponderance of the evidence . . . a significant and viable relationship with the child . . . and [v]isitation with the petitioner is in the best interest of the child"); Mich. Comp. Laws § 722.27b(4)(b) ("grandparent . . . must prove by a preponderance of the evidence that the parent's decision to deny grandparenting time creates a substantial risk of harm to the child's mental, physical, or emotional health"); Tex. Fam. Code Ann. § 153.433(2) ("grandparent . . . overcomes the presumption that a parent acts in the best interest of the parent's child by proving by a preponderance of the evidence that denial of possession of or access to the child would significantly impair the child's physical health or emotional well-being").

which set of rules grants greater protection to parental rights—the one requiring a showing of "harm" under a mere preponderance standard, or the one requiring a showing of other similar (though alternately labeled) circumstances under a clear or convincing standard. Indeed, the Pennsylvania Supreme Court concluded that an independent "specific requirement of harm or potential harm" was not necessary precisely because of the other protections that its statute and precedents afford parents. 25a.

As this Court made clear in *Troxel*, the adoption of a bright-line rule requiring a showing of harm for all grandparent visitation orders would undermine the states' ability to evaluate cases on their individual facts. Petitioner's alleged "divide" is an arbitrary line drawn to distract attention from the facts of this case and give him another opportunity to achieve the result he desires. It does not reflect a conflict that merits this Court's attention.

II. A Grant of the Petition Would Deeply Enmesh This Court in Case-By-Case Line-Drawing in an Area of Law Traditionally Left to the States.

It has long been the position of this Court that "the whole subject of the domestic relations of husband and wife, parent and child, belongs to the laws of the States and not to the laws of the United States." *Rose v. Rose*, 481 U.S. 619, 625 (1987). Since the early days of American history, the Court has striven to avoid entanglement in domestic relations cases of all stripes. *See, e.g., Barber v. Barber*, 62 U.S. 582, 584 (1859) (divorce

and alimony); *Ohio ex rel. Popovici v. Agler*, 280 U.S. 379 (1930) (same); *cf. Ankenbrandt v. Richards*, 504 U.S. 689, 702 (1992) (child custody); *Marshall v. Marshall*, 547 U.S. ___ (2006), 126 S. Ct. 1735 (probate).

The deference to state courts in the domestic relations realm, of course, is not absolute. This Court agreed to hear a child visitation question in *Troxel* because a fundamental parental right was threatened. But here petitioner is not asking this Court to prevent encroachment on an existing constitutional right. Rather, in essence he seeks to have the Court constitutionalize the field of grandparent (perhaps even all third-party) visitation law. *See* Pet. at 19.

In *Troxel*, this Court was faced with a state's failure to adhere to basic due process principles. The Washington state trial court applied a "breathtakingly broad" statute, 530 U.S. at 67, issued only "slender findings," *id.* at 72, and failed to give any deference to parental decisions regarding children's best interests, *id.* at 69. These manifest deficiencies moved this Court to act – but with great circumspection.

The plurality in *Troxel* specifically declined to address either the facial validity of the Washington statute or the broad constitutional rationale advanced by the Washington Supreme Court for overturning it. Instead, the decision was based "on the sweeping breadth of [the statute] and the application of that broad, unlimited power in [that] case." *Id.* at 73. The decision thus articulated this Court's disapproval of a dramatic failure to respect basic parental rights, while

also allowing the Court to avoid deeper involvement in an area of law that is complex, fact-intensive, and traditionally left to the states. Petitioner now wishes to enmesh the Court in exactly the case-by-case adjudication and line-drawing that *Troxel* eschewed.

Petitioner suggests that he is merely requesting the application of a bright-line grandparent visitation rule that has already been clearly delineated by 12 states. Pet. at 21, 23. This is not so. As discussed above, the law of those states is subject to a multiplicity of nuances and fact-specific variations. *See supra* pp. 11-14.

The rule petitioner proposes is, by its own terms, ambiguous and does not provide a clear-cut principle that will allow this Court to avoid extensive further line-drawing in the future. Most notably, petitioner has failed to offer any definition of "harm." Is it limited to actual harm, or does it include potential harm? Is it limited to physical harm, or does it include emotional or psychological harm? Is it measured in comparison to the child's state before the death of his parent, or to the pre-litigation status quo? Petitioner does not answer these questions, and the decisions of the 12 courts he cites do not provide any consensus.

Thus, grant of the petition would provide no final answer to constitutional questions in this area. To the contrary, it would simply create a panoply of new visitation questions for the Court to resolve. The federalization of this area of family law would then be complete.

If the definition of "harm" were to become the new boundary line of constitutionality, then nearly every grandparent visitation application in the country would implicate constitutional principles. *Troxel* represented a reasonable response to the inherent difficulties of applying the Due Process Clause to family law. Petitioner's proposed dramatic expansion of that response is unnecessary and would needlessly complicate this area of law—one traditionally relegated to the states.

III. The Pennsylvania Supreme Court's Decision Does Not Provide Any Reason for This Court To Reconsider the Issue of Grandparent Visitation.

The decisions made by the Pennsylvania courts in the instant case fully comport with the principles set forth in *Troxel*. Petitioner was afforded a presumption that his parental decision regarding grandparent visitation was in the child's best interest, and that presumption was overcome by respondent in a constitutionally permissible manner. The Pennsylvania Supreme Court's reading of Section 5311—coupled with the heightened evidentiary burden already placed on grandparents by virtue of Pennsylvania precedent—sufficiently protect a fit parent's right to direct the upbringing of his or her children under the Due Process Clause. As such, this case presents no need for review.

The *Troxel* plurality cited with approval several state statutes that, properly applied, would accord to a fit parent's visitation decision the type of "special weight" contemplated by this Court. 530 U.S. at 69-70.

As the Pennsylvania Supreme Court noted, the Minnesota and Nebraska statutes included in this list are both substantially similar to Pennsylvania's Section 5311. 15a-16a n.16 (citing Minn. Stat. § 257.022(2)(a)(2) (now codified at Minn. Stat. § 257C.08); Neb. Rev. Stat. § 43-1802(2)).

In applying Section 5311, the Pennsylvania Supreme Court specifically recognized the "fundamental nature of the right" at issue and applied strict scrutiny analysis to determine whether infringement of that right was "supported by a compelling state interest," specifically, "the state's longstanding interest in protecting the health and emotional welfare of children." 17a-18a. The court recognized that Section 5311 narrowly limits the class of grandparents who may seek visitation (to those whose children have died) and that Pennsylvania precedent requires a strong presumption in favor of fit parents' decisions when those decisions are subject to judicial review. 19a-20a.

This presumption squarely provided the parental decision the "special weight" this Court envisioned in *Troxel*. Moreover, the burden placed on the grandparent to rebut that decision was significant. The showing required of the grandparent was not just that the visitation would be in the child's best interest, but also that it was an extension of an already deep relationship and that it would not interfere with the relationship between the parent and the child. 20a.

Summarizing its analysis, the Pennsylvania Supreme Court held that as applied the statute struck a proper balance and was "narrowly tailored to protect the fundamental rights of fit parents while providing for appropriate state intervention to protect the welfare of children through court-ordered grandparent visitation or partial custody." 20a. The court then stated that "the stringent requirements of Section 5311, as applied in this case, combined with the presumption that parents act in a child's best interest, sufficiently protect the fundamental right of parents without requiring any additional demonstration of unfitness or specific requirement of harm or potential harm." 25a.

In effect, the court held that an independent finding of harm was unnecessary because it is already contemplated by the statutory requirements that visitation may only be awarded where it would not interfere with the parent-child relationship and that courts must consider the amount and nature of the pre-application contact between the grandparent and the child. In short, Pennsylvania is not a "no harm" state (assuming that there are any such states).

Understandably disappointed with the outcome of this visitation case, petitioner has attempted to create a semantic conflict among the states that does not exist in substance. In light of the above, however, we submit that to the extent the Court perceives any desire for further federal guidance in this area, this is not an appropriate case in which to provide such guidance.

CONCLUSION

As the Pennsylvania courts correctly applied the due process principles articulated by this Court in *Troxel* to the facts of this case, and the states are not deeply divided as to these principles, we respectfully request that the petition for writ of certiorari be denied.

Respectfully submitted,

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